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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

In re Grand Jury Proceeding
Involving
MATTHEW MADONNA,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NEWMAN & ADLER
522 Fifth Avenue
New York, New York 10036
(212) 682-4066

Attorneys for Petitioner
Matthew Madonna

GUSTAVE H. NEWMAN
DEBORAH A. SCHWARTZ
Of Counsel

Questions Presented

1. Is the conduct of a grand jury investigation solely for intelligence gathering purposes and to make the witness into a government informant to aid that purpose an abuse of the grand jury process?

2. Was the witness' refusal to testify, even under a grant of immunity, justified where the grand jury was utilized as a contempt trap solely to increase the term of imprisonment the witness is already serving?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Matthew Madonna, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 20, 1982.

Opinions Below

The opinion of the Court of Appeals is unreported and appears as Appendix A to this petition. The Court of Appeals affirmed an order of civil contempt, pursuant to 28 U.S.C. §1826(a), entered by the United States District Court for the Southern District of New York by the Honorable David N. Edelstein, United States District Judge, against petitioner on March 17, 1982. Madonna was confined until such time as he complied with the court order to testify, or for the term of the grand jury, or until August 25, 1983. At the time of the contempt citation, Madonna was serving a sentence of thirty years' impris-

onment for violation of the federal narcotics laws. The running of that sentence was stayed during his confinement for civil contempt.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. This petition for writ of certiorari is filed within 60 days of the entry of the Court of Appeals judgment of affirmance.

Questions Presented

1. Is the conduct of a grand jury investigation solely for intelligence gathering purposes and to make the witness into a government informant to aid that purpose an abuse of the grand jury process?

2. Was the witness' refusal to testify, even under a grant of immunity, justified where the grand jury was utilized as a contempt trap solely to increase the term of imprisonment the witness is already serving?

Statutory Provisions Involved

18 U.S.C. §6001, *et seq.*; 28 U.S.C. §1826(a). These provisions appear in Appendix B to this petition.

Statement of Facts

In 1954, Matthew Madonna was convicted of murder and sentenced to twenty years to natural life imprisonment. He served fourteen years in state prison for the commission of that offense.

In 1976, Madonna was convicted in the United States District Court for the Southern District of New York of two counts of violating the federal narcotics laws after a trial before the Honorable Robert L. Carter and a jury. Specifically, he was convicted of conspiring to distribute, possess with intent to distribute, and to import heroin, in violation of Title 21 United States Code, Sections 812, 841(a)(1), 841(b)(1)(a) and 952(a), and of the substantive offense of distribution and possession with intent to distribute heroin in violation of Title 21 United States Code, Sections 812, 841(a)(1), and 841(b)(1)(a). Madonna was sentenced to two consecutive terms of fifteen years' imprisonment and fined $50,000. Madonna has been incarcerated on that judgment of conviction since December 21, 1976.

On January 21, 1982, as Madonna began the sixth year of his thirty year sentence, he was summoned to testify before the January, 1982 Additional Grand Jury which was sitting in the Southern District of New York. After identifying himself, Madonna inquired about the scope of the grand jury's investigation and thereafter invoked his privilege against self-incrimination in refusing to answer any further questions. (Tr. 6)*

On February 17, 1982, the government applied for an order, pursuant to Title 18 United States Code, Section 6001, *et seq.*, immunizing Madonna and compelling him to testify before the grand jury. The application was supported by an affidavit of government counsel and was made with the approval of the Assistant Attorney General of the United States. The application recited the fact that Madonna had refused to testify on the basis of his privi-

* Numbers in parentheses preceded by the letters "Tr." refer to the transcript of the sealed contempt proceeding before the District Court.

lege against self-incrimination and that, in the judgment of the United States Attorney for the Southern District of New York, the testimony may be necessary to the public interest. (A. 4)* On the same date, the District Court issued the immunity order which compelled Madonna to testify as to all matters about which he may be interrogated before the grand jury. (A. 7)

> Q. I will read back to you, you asked the same question the last time you were before the grand jury and I answered it, and I am now going to read back the precise answer that I gave you on that prior occasion. "The Drug Enforcement Administration and my office are in possession of certain facts concerning your past activities in the narcotics field. We are also in possession of certain facts that indicate certain relationships or associations that you have had with other people. The general purpose of this inquiry is to see if we can't ascertain from you any information that might have that would add"—this is the literal thing—"that might have that would add to the substance of the intelligence that we are in possession of with respect to those two areas."

(Tr. 7-8).

Although Madonna had been incarcerated for 6 years, he was then asked when he had last been employed and his source of income. He was also asked whether he knew Robert Stepany, Mario Perna, Ralph Tutino, Leroy Barnes, Herbert Sperling, Steven Baker, Armand Cassario, Thomas Mancuso, Salvatore Larca and Joseph Boriello. (Tr. 8-12) Madonna declined to answer each

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*Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix submitted to the Second Circuit Court of Appeals.

specific question posed to him, as well as a catch-all question as to whether he would answer any question posed to him. (Tr. 12)

The prosecutor conducting the grand jury then conferred immunity upon Madonna by giving him a copy of the order. After consulting with counsel, Madonna returned to the grand jury and informed the prosecutor that whether he would respond to particular questions posed to him would depend on the question asked. (Tr. 13-14) However, as to the questions he had already been asked, he would continue to invoke his privilege against self-incrimination. (Tr. 17)

Shortly thereafter, the parties appeared before the District Court where the transcript of the day's grand jury proceedings was read into the record. Madonna raised several objections to demonstrate "just cause" for failing to comply with the court's order that he testify under a grant of immunity. 28 U.S.C. §1826(a). Madonna challenged the grand jury process as improper, claiming the grand jury had been convened solely for intelligence gathering purposes and that the questioning of him was being attempted in order to make him an informant in aid of that function. Furthermore, Madonna argued that the grand jury was being misused as a contempt trap to increase his already lengthy sentence of incarceration. Madonna also objected to testifying because of his belief the grand jury was being used as a tool for discovery in his post-conviction proceeding to vacate his sentence since he had been asked about Larca and Boriello, his former co-defendants in *United States* v. *Madonna*, 76 Cr. 846 (R.L.C.).

The government attempted to justify its insistence that Madonna testify before the grand jury as follows:

> The government's purpose here is a legitimate one. Being aware of Mr. Madonna's background, being aware of the type of activity he has been involved in over the years, being aware of the number of people that he has associated with and with whom he has been convicted, it occurs to me that I might reasonably say to myself, your Honor, this man is doing 30 years in jail. Maybe he wants to do something about it. That's why he was called before the grand jury.
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> The reason we brought him before the grand jury, I have just stated it to the court. This man has knowledge. This man has intelligence about past things and present things and the government says we will give you an opportunity, if you wish, to tell us about it.

(Tr. 26-27).

Before instructing the witness to answer, the District Court stated that Madonna's contention he had been brought before the grand jury "purely for investigative questioning" was "unsupported" and "conclusory." (Tr. 28) The Court therefore ordered him to go back to the grand jury and respond to questions. However, counsel for Madonna intervened and informed the Court that Madonna would adhere to his refusal to answer the questions which had been posed to him. (Tr. 30). The Court then granted the government's motion that Madonna be found in civil contempt, pursuant to 28 U.S.C. §1826(a), confined him until he testified or for the life of the grand jury, and stayed the running of Madonna's thirty-year prison sentence until that time.

The order of civil contempt dated March 17, 1982, formed the basis of an expedited appeal to the United States Court of Appeals for the Second Circuit. (A. 21-22) The

Second Circuit affirmed the order of civil contempt by judgment dated April 20, 1982.

Reasons for Allowance of the Writ

Point One

The Conduct of a Grand Jury Investigation Solely for Intelligence Gathering Purposes and to Make the Witness Into a Government Informant to Aid That Purpose Is an Abuse of the Grand Jury Process.

The only legitimate function of a grand jury is to determine whether or not probable cause exists to believe that a crime has been committed, and, if so, to file charges against such persons as are reasonably believed to have committed it. *Branzburg* v. *Hayes*, 408 U.S. 665, 686-87 (1972). *See also United States* v. *Calandra*, 414 U.S. 338, 343-44 (1974). Therefore the appropriate activity of a grand jury consists of two parts; the inquiry into the existence of possible criminal conduct and the concomitant protection of the citizen from unfounded indictment. *Branzberg, supra*, at 688.

In order to carry out its function, the grand jury has broad investigative power. It can compel production of such testimony and evidence it deems to be relevant, "unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974); *Costello* v. *United States*, 350 U.S. 359, 362 (1956). However, there are matters into which a grand jury may not inquire simply because they fall outside the area of its proper functions. Clearly, for example, a grand jury may not be impaneled nor its process used for the sole purpose of preparing an already pending indictment for trial. *United States* v.

Dardi, 330 F.2d 316, 336 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964). It has also been recognized that the grand jury process may not be used by a federal prosecutor solely to conduct his own investigation. *Durbin* v. *United States*, 221 F.2d 520, 522 (D.C.Cir. 1954). Moreover, a court will refuse to enforce a subpoena if the grand jury is not pursuing a good faith investigation or is motivated by a desire to harass. *United States* v. *Dionisio*, 410 U.S. 1 (1972); *Branzburg* v. *Hayes*, 408 U.S. 665, 707-08 (1972).

This limiting function of the federal courts may be exercised by means of the courts' supervisory powers over the grand jury process. Mr. Justice Rehnquist stated the general rule in *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973):

> Within such a unitary jurisdictional framework the appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.

See also McNabb v. *United States*, 318 U.S. 332, 240 (1943).

In this case, Matthew Madonna has been brought before a grand jury which has as its stated purpose the gaining of intelligence about his past relationships and activities. (Tr. 8) The government's only reason for calling Madonna was to see if he wanted "to do something" about the thirty-year sentence he is serving by cooperating with the government in its intelligence gathering. (Tr. 27) Under the circumstances in this case, this constitutes an abuse of the grand jury process and, therefore, Madonna had just cause to refuse to testify before the grand jury.

The District Court found Madonna's allegation that his presence before the grand jury was for purely investiga-

tive questioning to be "unsupported" and "entirely conclusory." (Tr. 28) However, the District Court was incorrect, because it was the government itself which had so described the scope of the grand jury's investigation. The prosecutor stated that:

> "The Drug Enforcement Administration and my office are in possession of certain facts concerning your past activities in the narcotics field. We are also in possession of certain facts that indicate certain relationships or associations that you have had with other people. The general purpose of this inquiry is to see if we can't ascertain from you any information that might have that would add"—this is the literal thing—"that might have that would add to the substance of the intelligence that we are in possession of with respect to those two areas.

(Tr. 7-8). It is, therefore, clear that the grand jury was seeking to add intelligence to the intelligence it already had and to do so by asking Madonna about activities and relationships over six years in the past.

Moreover, when the government sought to justify the use of grand jury process herein, it stated its purpose as follows:

> Being aware of Mr. Madonna's background, being aware of the type of activity he has been involved in over the years, being aware of the number of people that he has associated with and with whom he has been convicted, it occurs to me that I might reasonably say to myself, your Honor, this man is doing 30 years in jail. Maybe he wants to do something about it. That's why he was called before the grand jury.

(Tr. 27-8). It is, therefore, apparent that the purpose of the grand jury process was to make Madonna an informant to aid the grand jury in an intelligence gathering activity.

However, it is the Federal Bureau of Investigation and not a grand jury which has as its appropriate function the gathering of such background information. It is not proper for the process of the grand jury to be used to make Madonna the handmaiden of the F.B.I. Since Congress has not given the F.B.I. subpoena power or the ability to enforce such power with contempt, this Court should not allow this grand jury to become an arm of the F.B.I. and do indirectly what that agency cannot do directly. *See In re Stolar*, 397 F.Supp. 520 (S.D.N.Y. 1975).

The government cannot have had any reasonable expectation that Madonna would become an informant to aid it in gathering intelligence information. The government is aware that Madonna served fourteen years of a twenty to life sentence for murder without ever offering to exchange information for leniency with the state authorities. Indeed, the government also knows that Madonna has already served approximately five and a half years of his thirty year sentence on a federal narcotics conviction. Yet he has never contacted the federal authorities to become an informant on their behalf. Common sense dictates that if Madonna had been so inclined, he could have found his way to the prosecutor's office or to the F.B.I.

Accordingly, the grand jury process which is being used to make Madonna into an informant in aid of an intelligence gathering function is an abuse of the grand jury. Madonna thus had just cause to refuse to testify before the grand jury, and he should not have been held in contempt.

Point Two

The Grand Jury Was Conducted as a Contempt Trap to Increase the Term of Imprisonment the Witness Is Already Serving and, Therefore, the Witness' Refusal to Testify, Even Under a Grant of Immunity, Was Justified.

The function of the federal grand jury is to determine whether to indict persons suspected of committing serious crimes. United States Constitution, Amend 5. The grand jury has investigatory power of broad scope to seek information bearing on the decision to indict.

> Because its task is to inquire into the existence of possible criminal conduct and return only well-founded indictments, its investigative powers are necessarily broad.

Branzburg v. *Hayes*, 408 U.S. 664, 668 (1972). However, use of the grand jury for purposes outside its legitimate investigative authority is an abuse of process. *See, e.g., United States* v. *Fisher*, 455 F.2d 1101, 1105 (2d Cir. 1972).

In this case, the government's real purpose in requiring Madonna's appearance before the grand jury was to cite him for contempt. It is apparent from the scope of the investigation of the grand jury as stated by the prosecutor that the grand jury is seeking merely to add information to the intelligence it already has about Madonna's activities and relationships in the period before his incarceration, almost six years ago. In addition, the government's sole justification for calling Madonna as a witness was to see if he would become an informant of such intelligence. Knowing the lengthy periods of incarceration Madonna had already served, the government could have

no legitimate expectation that he would supply any information to it. These circumstances make it apparent that the calling of Madonna before the grand jury after conferring immunity on him was a transparent effort to use his expected refusal to testify as a basis for holding him in contempt. This was an illegitimate use of the grand jury.

An analogous situation has arisen in the area of the so-called perjury trap. In *Brown* v. *United States*, 245 F.2d 549, 555 (8th Cir. 1957), a witness appeared before a grand jury called, sworn and sitting in the District of Nebraska, but the false statements he made had to do with matters which occurred in the Eastern District of Missouri. The Court of Appeals reversed the defendant's conviction and ordered the indictment dismissed because the compelling of testimony with a view to prosecuting the witness for perjury without any purpose of obtaining any evidence upon which it could indict anyone for a crime is not a competent activity for a grand jury. The Court had found that the evidence

> clearly established that [the prosecutor's] purpose was simply to do what he did, viz., to extract from the defendant his testimony about the talk in which he had taken part in St. Louis on May 3, 1959, knowing that his recollection of it differed from that of the others present, and to get him indicted for perjury. He knew how each of the parties to that talk, including defendant, remembered it because each had made his sworn statement to investigator Strain, and three of the parties to the talk had already given their recollection of it to the grand jury before [the prosecutor] called defendant. Extracting testimony from defendant had no tendency to support any possible action of the grand jury within its competency. The

> purpose to get him indicted for perjury and nothing else is manifest beyond all reasonable doubt.

Brown v. *United States*, 245 F.2d 549, 555 (8th Cir. 1957).

To like effect is the holding of the District Court of Colorado in *United States* v. *Thayer*, 214 F.Supp. 929 (D. Colo. 1963). In that case, the defendant had given testimony before an investigative proceeding of the Securities and Exchange Commission which differed from that of other witnesses. The defendant was summoned again before the SEC, gave the same testimony, and was indicted for perjury. The court ordered a hearing to inquire into the government's purpose in summoning the defendant to give the testimony which led to the indictment, stating:

> If it should appear that the government was substantially certain prior to the April 19th hearing that the defendant would give false answers, it would then follow that the testimony so induced should not be received in evidence.

The court held:

> An indictment charging an offense which is entirely the work product of the government cannot be upheld.

Id.

Similarly, in *United States* v. *Icardi*, 140 F.Supp. 383 (D.D.C. 1956), the defendant was called before a congressional subcommittee investigating the circumstances surrounding the disappearance and death of Maj. William V. Hollahan. Icardi appeared before the subcommittee and, before he testified, was warned by the chairman that anything he said might be used against him in a future proceeding. The subcommittee counsel also informed Icardi that the subcommittee was in possession of the transcripts

of his prior statements in connection with the matter. Despite the warning, Icardi answered questions and reiterated his prior statements concerning the disappearance of Major Hollahan.

The District Court stated that Icardi could have done one of three things when he testified. He could have confessed, asserted his privilege against self-incrimination, or repeated his denial of guilt as he had in his previous statements. Since the subcommittee had sufficient information upon which to make its report, the calling of Icardi to testify under such circumstances was improper. The Court wrote:

> It is unnecessary for the court to determine for which purpose Icardi's testimony was sought or obtained, since neither affording an individual a forum in which to protest his innocence nor extracting testimony with a view to a perjury prosecution is a valid legislative purpose.
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> On the basis of all the evidence before it, the court therefore finds, as a matter of law, that at the time the subcommittee questioned the defendant Icardi, it was not functioning as a competent tribunal.

140 F.Supp. at 388.

Because the subcommittee was working outside its proper function, the Court held the defendant's testimony did not relate to a material matter and thus failed to satisfy an element of the offense of perjury.

Under the same reasoning, since the government here knew that Madonna would not testify and also knew there was no legitimate grand jury investigation, the requiring of Madonna's testimony was for no other purpose than

to create a basis for his being held in contempt. The sanction of civil contempt has the sole punitive effect of increasing Madonna's term of imprisonment imposed in his narcotics case.

Since the government's purpose in calling Madonna before the grand jury was to have him held in contempt, there has been an abuse of the grand jury process.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

NEWMAN & ADLER
522 Fifth Avenue
New York, New York 10036
(212) 682-4066

Attorneys for Petitioner
Matthew Madonna

GUSTAVE H. NEWMAN
DEBORAH A. SCHWARTZ

Of Counsel